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Supreme Court, U.S.
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No. 95-210

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1995

HOLLY FARMS CORPORATION;
TYSON FOODS, INCORPORATED,
Petitioners,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

CHAUFFEURS, TEAMSTERS AND HELPERS,
et al.,
Intervenors.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

INTERVENORS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Petitioner Tyson Foods become legally obligated to bargain with the unions representing the employees of Petitioner Holly Farms following its purchase of the stock of Holly Farms on July 18, 1989?

2. Did the NLRB and the Fourth Circuit Court of Appeals properly require Petitioners to negotiate over the effects of their decision to transfer the driver/yardmen employees to Petitioner Tyson Foods?

3. Was the NLRB's remedy of reinstatement and back pay proper for employees who were unlawfully discharged?

4. Did the NLRB properly exercise its expertise in determining, under the facts in this case, that live haul drivers, forklift drivers and chicken catchers are not agricultural employees?

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

STATEMENT OF THE CASE AND FACTS 1

A. The Driver/Yardmen Unit 1

B. The Live-Haul Unit 12

REASONS WHY THE PETITION SHOULD BE DENIED 14

I. THE NLRB AND THE FOURTH CIRCUIT CORRECTLY FOUND THAT TYSON FOODS BECAME A "SUCCESSOR" EMPLOYER. 17

A. Neither the Fourth Circuit Nor the NLRB Decision Raises the First Question Presented in the Petition. 17

B. The Fourth Circuit's Decision Does Not Conflict With the Decisions of Other Circuits. 19

C. The Fourth Circuit and NLRB Decision on This Point Are Correct. 26

II. THE NLRB AND THE FOURTH CIRCUIT PROPERLY REQUIRED THE PETITIONER TO BARGAIN OVER THE EFFECTS OF THEIR DECISION TO TRANSFER THE DRIVERS TO TYSON FOODS. 29

III. REINSTATEMENT WITH BACK PAY WAS THE PROPER REMEDY FOR EMPLOYEES DISCHARGED IN VIOLATION OF THE NLRA . 32

IV. THE NLRB PROPERLY EXERCISED ITS EXPERTISE IN DETERMINING THAT LIVE-HAUL DRIVERS, FORKLIFT DRIVERS AND CHICKEN CATCHERS ARE NOT AGRICULTURAL EMPLOYEES 33

A. The Fourth Circuit Correctly Deferred to the NLRB's Decision on This Issue. 33

B. There is No Conflict Between the Circuits on This Issue 35

CONCLUSION 37

TABLE OF AUTHORITIES

Page

CASES

Bayside Enterprises, Inc. v. NLRB, 429 U.S. 298 (1977) 16, 34, 35, 36, 37

Coleman v. Sanderson Farms, Inc., 629 F.2d 1077 (5th Cir. 1980) 36, 37

EPE, Inc. v. NLRB, 845 F.2d 483 (4th Cir. 1988) 20, 21, 23, 26

Fall River Dyeing and Finishing Corp. v. NLRB, 482 U.S. 27 (1987) 23

First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981) 15, 30, 31

General Teamsters Union No. 249 v. Bill's Trucking, Inc., 493 F.2d 956 (3d Cir. 1974) 22

Howard Johnson Co. v. Detroit Local Joint Executive Board, 417 U.S. 249 (1974) 18

NLRB v. Burns International Security Services, 406 U.S. 272 (1972) 17, 18

NLRB v. Cal-Main Farms, Inc., 998 F.2d 1336 (5th Cir. 1993) 35

NLRB v. Edjo, Inc., 631 F.2d 604 (9th Cir. 1980), enforcing 238 NLRB No. 207 (1978) 27

NLRB v. Food Store Employees Local 347, 417 U.S. 1 (1974) 32

NLRB v. Hudson Farms, Inc., 681 F.2d 1105 (8th Cir. 1982) cert. denied, 459 U.S. 1069 (1982) . . . 35

NLRB v. Litton Fin. Printing Division, 893 F.2d 1128 (9th Cir. 1990), rev'd in part on other grounds, 501 U.S. 190 (1991) 30

NLRB v. Victor Ryekebosch, Inc., 471 F.2d 20 (9th Cir. 1972) 36

NLRB v. Winco Petroleum, 668 F.2d 973 (8th Cir. 1982) 27

Valmac Industries v. NLRB, 599 F.2d 246 (8th Cir. 1979) 36

Virginia Elec. & P. Co. v. NLRB, 319 U.S. 533 (1943) 33

Wirtz v. Ti Ti Peat Humus Company, Inc., 373 F.2d 209 (4th Cir.) cert. denied, 389 U.S. 834 (1967) 35

STATUTES

29 U.S.C. § 160(c) 32

STATEMENT OF THE CASE AND FACTS

The NLRB found that the Petitioners had committed dozens of unfair labor practices. Petitioners did not appeal most of those findings to the Fourth Circuit and raise even fewer in their Petition for Writ of Certiorari. This Statement of Facts discusses only those facts important to the issues raised by Petitioners.

A. The Driver/Yardmen Unit.

On March 27, 1989[1] the NLRB certified the Intervenors as the exclusive bargaining representative for the employees in the driver/yardmen unit. Shortly thereafter, the Intervenors and Holly Farms began negotiations for a collective bargaining agreement. The parties met numerous times during the late spring and early summer and had scheduled negotiations for July 10 through 12. Just prior to July 10, Jesse Hogg, the chief negotiator for Holly Farms,

[1]All dates are 1989 unless otherwise noted.

called the Intervenors' chief negotiator and advised that Holly Farms was being purchased by Tyson Foods, Inc. (hereinafter "Tyson") and suggested the negotiating sessions be postponed because he did not know whether he would be retained as the chief negotiator following the purchase by Tyson and did not know what position would be taken at the bargaining table following the purchase by Tyson.

The parties stipulated that on July 18 Tyson purchased all of the stock of Holly Farms and thereafter engaged in the same business operations at the same locations having the same product and substantially the same customers and had, as a majority of its employees, individuals who were previously employees of Holly Farms. However, the management employees who had previously supervised the drivers in the driver/yardmen unit immediately became Tyson supervisors, wearing Tyson uniforms and carrying out Tyson orders.

The negotiations resumed on August 8, 9 and 10 (A-602-608) and at that time, Hogg continued as chief negotiator for the employer. He advised the Intervenors that Holly Farms was now fully owned by Tyson and that Tyson had full control over the operation of Holly Farms, including labor relations. At those renewed negotiations, the individuals who had formerly been negotiating on behalf of Holly Farms had now become part of the Tyson management team and, in addition, individuals who were Tyson employees and who had not been present at the earlier negotiations, were now present and participating.

While the employees continued to receive their pay by way of Holly Farms checks, it was readily apparent to the employees in the driver/yardmen unit that they were being supervised and their destinies controlled by Tyson.

At the August 8 negotiating session, Hogg stated that the Company had decided to make certain changes which would affect certain employees in the driver/yardmen unit.

The Intervenors objected to, and sought a chance to bargain about, those unilateral changes. Hogg also announced that Tyson was withdrawing the 4% pay increase that Holly Farms had proposed in the June 22 negotiating session.

At the negotiating session on September 12, (A-618-628) Hogg opened the meeting by stating that he was not there to negotiate but to make an announcement. He said Tyson was going to integrate the drivers into Tyson's Transportation Division and that they would become Tyson employees and be paid under the Tyson pay scale. The Intervenors objected, asked questions and requested information from the Petitioners. The Petitioners told the Intervenors that they did not intend to integrate any other division of Holly Farms employees into Tyson. When the Intervenors asked what the Petitioners intended to do with respect to the yardmen in the driver/yardmen unit, Hogg stated they would do whatever was feasible in placing those employees.

On the day following the September 12 meeting, Petitioners met with the driver employees and told them of the proposed merger of the Transportation Division. During the course of one of those meetings, an employee asked about the status of the Union, and supervisor Howard Baird stated: "There is no more Union."

While the Petitioners continue to maintain that these changes were necessary because the Holly Farms driver/yardmen operation was operating with an annual loss of $5 to $6 million, that figure is simply incorrect. That loss figure comes from Respondents' Exhibit 14, which is a recalculation of the Holly Farms driver/yardmen unit operating expenses. The first column of that exhibit shows the total revenue to Holly Farms based upon a mileage rate of $1.28 per mile. There was no actual revenue to this unit since these were all intercompany transactions. However, using a figure of $1.28 per mile was reasonable because that was comparable to what Holly Farms was having to pay to

have outside carriers haul their product. One of the former Holly Farms supervisors, David Hayes, testified that by the summer of 1989, Holly Farms had reduced its cost per mile for the Company trucks to $1.20 to $1.21 per mile and that at this figure, he felt they were competitive with outside carriers. Mr. Hayes stated that any difference which the Company would have saved by using outside carriers was well worth paying in order to have the better service rendered by having Holly Farms' own employees deliver the product. Thus a comparison of that $1.28 per mile figure with the actual expense figure shows that Holly Farms was not losing money as claimed by the Petitioners. However, instead of using a revenue figure based upon what an outside carrier would charge or what the actual expenses were to Holly Farms, the Tyson officials changed the Holly Farms revenue figures to a per-mile charge of $1.005 per mile. This is shown in the third column of Respondents' Exhibit 14. Petitioners gave no explanation as to how they arrived

at that $1.005 per mile figure. However, by claiming revenue at the artificially low $1.005 per mile rate, and comparing that figure to actual expenses, Petitioners claimed that Holly Farms was suffering a $480,000 per month loss — some $5 to $6 million per year. Of course, had Petitioners used as a revenue rate the rates at which outside carriers would haul this freight — $1.30 to $1.40 per mile — then Holly Farms would show a profit rather than a loss.

The Petitioners also claimed that the integration was necessary because Holly Farms was driving a large number of empty (deadhead) miles and that this adversely affected their profitability. Again, Petitioners' own exhibits showed that the deadhead miles driven by Holly Farms were less than 21% of all miles driven and that Tyson's own deadhead miles averaged 10% and had been, in the late 1980's, as high as 12%. Thus Holly Farms' deadhead miles were only 9% to 10% greater than were Tyson Foods' deadhead miles. While there would be some savings if the Holly Farms

deadhead miles could be reduced to the Tyson levels, this would not result in anywhere near the large amount of savings Petitioners claimed would result from the transfer of drivers from Holly Farms to Tyson.

The Petitioners also claimed that following September 22, the driver/yardmen unit was fully merged and integrated into the Tyson operation. The Board disagreed and found that the driver/yardmen unit remained a separate appropriate unit. (A-127-131) That decision was affirmed by the Fourth Circuit. At the time of the ALJ's hearing, there was virtually no interaction between the former Holly Farms drivers and drivers who worked for Tyson prior to September 22. Since September 12, there have been no transfers between Tyson's divisions and the former Holly Farms unit and the former Holly Farms drivers virtually never even see any of the Tyson drivers on the road. The former Holly Farms drivers are under separate supervision from the remaining Tyson drivers and are paid on Holly

Farms checks; receive the same benefits as other Holly Farms drivers, benefits which were greater than those paid to Tyson drivers; former Holly Farms drivers were generally paid more than Tyson drivers; and all records for the former Holly Farms drivers are kept in Wilkesboro, whereas the records for other Tyson drivers were kept in Arkansas. Moreover, until at least January 1990, the trucks driven by these former Holly Farms drivers were operated under Holly Farms' ICC operating authority.

Many of the other changes which Petitioners claimed they made in the alleged integration were purely cosmetic and demonstrate that the former Holly Farms drivers still work in much the same way in the same separate unit as they did before the claimed "integration". Thus, for example, Petitioners claim that they changed the Holly Farms system to a fleet manager concept for dispatching drivers. However, testimony showed that the fleet managers are primarily responsible for the assignment of freight loads

to particular drivers, that the fleet managers are assigned to work at their respective terminals and report to an operations manager, and that below the fleet manager are two dispatch coordinators for every 50 to 60 trucks. Thus the fleet managers under the Tyson system are virtually identical to the dispatchers under the Holly Farms system, and those fleet managers not only do the same work as previously done by dispatchers, but were themselves previously dispatchers for Holly Farms. Likewise, other positions formerly at Holly Farms remained the same under Tyson, except for a change in title.

Other evidence also showed that the former Holly Farms drivers maintained a separate identity from the Tyson drivers. The Holly Farms drivers work out of a previously existing Holly Farms facility in Wilkesboro, North Carolina, though they are still allowed to park their vehicles at the terminals at which they worked and continue to have the first leg of their trip begin at the terminal near their home. The

former Holly Farms drivers continue to take their original loads from the same plants as they had prior to September 22, drive the same routes they had for Holly Farms, and ultimately return to those plants and park their vehicles just as they had done prior to September 22. The Tyson drivers do not keep their vehicles at those locations, do not begin their trips at those locations, and do not return to those locations. Based upon these facts, as well as others, the ALJ and the Board found that the Holly Farms driver/yardmen unit remained identifiable and separate from the remainder of the Tyson drivers and was an appropriate unit for negotiating purposes. (A-722-738, A-127-131)

Following the September 12 meeting, Intervenors sent several letters to Petitioners in an attempt to meet and bargain and to secure relevant information. The Petitioners took the position that the Intervenors were not entitled to the requested information, and Tyson refused to meet or negotiate with the Intervenors on any subject. Some 209

drivers were sent letters by the Petitioners offering them employment with Tyson under terms unilaterally set by Tyson. Some 47 drivers rejected these employment terms set forth in that letter (which included reductions in their rate of pay) and refused to accept the job offered in that letter. The remainder of the drivers signed the statement in the September 12 letter accepting employment, but shortly thereafter commenced a strike against the Petitioners because of the unfair labor practice of the Petitioners, including refusal to bargain with their union.

B. The Live-Haul Unit.

On February 16, one of the Intervenors, Chauffeurs, Teamsters and Helpers Local 391 (hereinafter "Local 391") filed a petition seeking to represent the live haul, feed haul, feed mill and service center employees at the Holly Farms facilities in Wilkesboro and Roaring River, North Carolina (hereinafter referred to as the "live-haul unit"). At the election in that unit, there were 95 ballots cast for the Union

and 95 ballots cast against the Union, with one challenged ballot, which the ALJ ultimately determined should not be counted.

As part of its production process, Holly Farms operates an egg hatchery at its Wilkesboro facility. Shortly after the chicks are hatched, Holly Farms transports them to the farms of independent contract farmers who receive payment to raise the chicks into full-grown broiler chickens. The contract farmer feeds the chicks with feed produced at Holly Farms' feed mill facility in Roaring River, North Carolina. At that facility, feed mill employees process grain into feed and feed haul drivers transport it to the contract farms. The Roaring River facility also employs mechanics who service the trucks that haul the feed.

After the contract farmers have raised the chicks to full-grown broiler chickens, Holly Farms sends "live-haul" crews from its Wilkesboro facility to the contract farms. A live-haul crew consists of a live-haul truck driver, a forklift

operator, and about nine "chicken catchers." At the contract farm, the chicken catchers manually catch and box the chickens, and the forklift operator places the boxes on the truck. The crew then delivers the chickens back to the processing plant at the Wilkesboro facility. On occasion, the live-haul crews also transport to the processing plant chickens that Holly Farms purchases from outside sources. At the processing plant, Holly Farms production employees slaughter the chickens and prepare them for market. The sole issue regarding this unit is whether certain of the employees within the unit are agricultural employees.

REASONS WHY THE PETITION SHOULD BE DENIED

The Petitioners bring forward four issues in their Petition. However, none of these issues warrant review by this Court. First, the issue of whether Tyson Foods became a successor to Holly Farms solely through its purchase of the stock of Holly Farms was not addressed by the Fourth

Circuit below. Instead, it and the Board made their determination based upon all the facts and found that Tyson Foods became obligated to deal with the unions representing Holly Farms employees following its purchase of the Holly Farms stock. That decision was clearly correct under this Court's earlier decisions and does not conflict with any decision of any other circuit court.

Similarly, the Fourth Circuit used the correct standard in holding that the Petitioners must bargain about any "effects" which are "not the inevitable consequence" of the Petitioners' decision to transfer drivers from Holly Farms to Tyson Foods. That standard meets the policies underlying this Court's decision in First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981) and is the same standard used by the only other circuit to have considered the issue.

The third issue raised by the Petitioners concerns whether the Board was correct in ordering reinstatement with back pay to some 47 employees unlawfully discharged. As

Congress gave the Board the exclusive power to determine remedial relief under the National Labor Relations Act (the "Act") and as § 10(c) of the Act specifically provides that the Board can grant reinstatement with back pay, this issue does not present, in any way, an issue which needs this Court's attention.

The last issue raised by the Petitioners similarly does not require this Court's review. That issue, regarding whether certain employees in the live-haul unit are agricultural workers and thus exempt from the Act, has been addressed and answered in Bayside Enterprises, Inc. v. NLRB, 429 U.S. 298 (1977). The Fourth Circuit correctly deferred to the Board's decision as required by this Court in Bayside, and its decision does not conflict with any other circuit decision reviewing a Board decision on this issue.

I. THE NLRB AND THE FOURTH CIRCUIT CORRECTLY FOUND THAT TYSON FOODS BECAME A "SUCCESSOR" EMPLOYER.

A. Neither the Fourth Circuit Nor the NLRB Decision Raises the First Question Presented in the Petition.

The first question presented in the Petition (p. i) is: "Does a purchaser of the stock of an ongoing corporation, solely by virtue of its stock ownership interest, become a successor under NLRB v. Burns International Security Services, 406 U.S. 272 (1972), to the employing corporation's bargaining obligation with an existing union at the time of the stock purchase?" However, neither the Fourth Circuit nor the Board decided that narrow issue. Instead of focusing on whether a company can become a successor "solely by virtue of its stock ownership interest," both the Fourth Circuit and the Board followed this Court's directions to determine whether, under all of the facts and in light of prevailing labor law policies, the Petitioner Tyson Foods

became legally obligated to the employees of the Petitioner Holly Farms following its purchase of the stock of Holly Farms on July 18, 1989.

This Court has repeatedly stated that the obligations of a company to employees of another company arise under "a variety of circumstances involving a merger, stock acquisition, reorganization or assets purchase." NLRB v. Burns International Security Services, Inc., 406 U.S. 272, 291 (1972). Whether such an obligation arises "requires analysis of the new employer and of the policies of the labor laws in light of the facts in each case." Howard Johnson Co. v. Detroit Local Joint Executive Board, 417 U.S. 249, 262 n. 9 (1974).

While the Fourth Circuit correctly followed these directives in rendering its decision, the Petitioners focus only on Tyson's purchase of the Holly Farms stock and argue that with a stock purchase, Tyson could never become a "successor" at the time the stock is purchased. Petitioners'

view of who can become a "successor" is far too narrow and conflicts directly with this Court's mandate that the NLRB and the courts engage in a much broader inquiry.

Thus the narrow issue set out in Petitioners' first Question Presented was not resolved either by the Fourth Circuit or the NLRB. This case therefore is not appropriate for review.

B. The Fourth Circuit Decision Does Not Conflict With the Decisions of Other Circuits.

Petitioners are also incorrect when they claim that the Fourth Circuit "decision is inconsistent with the decisions of all other circuits that have considered the issue." (Petition for Writ of Certiorari, p. 25) Thus, since no conflict exists, this petition does not afford an opportunity to resolve a conflict among the circuits.

The decisions relied upon by the Petitioners from the Sixth, Seventh, Tenth and District of Columbia circuits do not stand for the proposition espoused by the Petitioners —

that is, none of those decisions hold that a company which purchases the stock of another company (rather than purchase its assets or merge with it) can never be found to have an obligation to deal with the union for the employees of the purchased company. The factual situations in those cases simply did not give rise to this narrow question. Instead, those decisions support, rather than conflict with, the decision rendered by the Fourth Circuit in this case.

Similarly, the Petitioners incorrectly assert that the Fourth Circuit decision in this case conflicts with the earlier Fourth Circuit decision in EPE, Inc. v. NLRB, 845 F.2d 483 (4th Cir. 1988). (See Petition at p. 40 n. 3) Under the Fourth Circuit rules, one panel of the Court cannot overrule a decision previously made by another panel. The Fourth Circuit obviously did not believe it was overruling EPE in this case — in fact, it cited EPE in support of several of its conclusions. While the Petitioners, in both their motion for reconsideration en banc and their motion to stay mandate,

claimed that the Fourth Circuit decision in this case conflicted with EPE, the Fourth Circuit denied both the request for rehearing en banc and the motion to stay mandate. It would not have done that had it believed that the decision in this case overruled EPE.

Similarly, in their motion for reconsideration and rehearing en banc and its motion to stay mandate, the Petitioners asserted to the Fourth Circuit that its decision conflicted with the decisions of other circuits. In its decision in this case the Fourth Circuit specifically did not find that its position conflicted with those of the other circuits. Instead, it took the position that its decision conformed to the tenets espoused in the other circuits. Just as the Fourth Circuit decision in this case did not conflict with its earlier opinion in EPE, the Fourth Circuit decision does not conflict with the opinions rendered by other circuits.

The Fourth Circuit and the Board both found that Tyson became a "successor" to Holly Farms as of July 18,

1989. They used the term "successor" in the sense of "the extent to which an employer is obligated to honor the legal relations established between another employer and a union." General Teamsters Union No. 249 v. Bill's Trucking, Inc., 493 F.2d 956 (3d Cir. 1974). The issue of when an employer becomes obligated to honor legal relations previously existing between another employer and its employees and their bargaining representative arises in a multitude of contexts, and the Board and the courts have utilized a variety of formulae to resolve the issue. Underlying all of these formulae (single employer, joint employer, alter egos, successor employers, etc.) is a basic policy that attempts to promote "industrial peace underlying the National Labor Relations Act by forestalling the employee frustration that would result if employees find themselves in substantially the same job, but deprived of the representation of the union." EPE, Inc. v. NLRB, 845 F.2d 483, 489 (4th Cir. 1988). See also Fall River Dyeing and

Finishing Corp. v. NLRB, 482 U.S. 27, 39-40 (1987).

This Court and the Board have recognized that with the wide variety of corporate transformations possible, an employer should not be able to use a successor enterprise as a way a getting rid of a labor contract or union representation. While an employer is free to structure its business in a variety of ways, it cannot do so in such a way as to thwart union representation. Thus the Board and the Courts look to the employees' perceptions and "if the employees find themselves in essentially the same job after the employer transition and if their legitimate expectation and continued representation by their union is thwarted," Fall River Dyeing, supra at 43, the surviving (or, in other words, "successor") employer is bound to recognize and bargain with the employees' union. In some instances, the old employing enterprise will disappear or have no further relationship to the employee. In other cases, the old employing enterprise will continue to have some relationship

to the employees.

Following July 18, 1989, management employees who had previously supervised the drivers in the driver/ yardmen unit immediately became Tyson supervisors, wearing Tyson uniforms and carrying out Tyson orders. Tyson also took over control of the negotiations with the chosen collective bargaining representative. While the employees continued to receive their pay by way of Holly Farms checks, it was readily apparent to the employees in the driver/yardmen unit that they were being supervised and their destinies controlled by Tyson. The Board and the Fourth Circuit correctly recognized that from July 18 forward, Tyson controlled and directed the employees in the driver/yardmen unit, regardless of what corporate name they ascribed as the employees' employer, and that Tyson was therefore an employer with a duty to negotiate with the employees' chosen bargaining representative. That decision does not conflict with the decisions of this Court or the other

circuits.

The Petitioners' argument is also premised on a false factual claim — that is, that there were no substantial changes in the operation affecting the employees. What the Fourth Circuit and the Board found was that there was a substantial continuity between Holly Farms and Tyson. (See Fourth Circuit decision at A-25) But that does not mean that there was not a broader form of reorganization than a mere stock transfer. The Board, in particular, made extensive findings concerning Tyson's involvement in the operation of the driver/yardmen unit as of the time of its purchase of the stock on July 18, 1989. (See NLRB decision, A-110-114) It was this involvement of Tyson in the operation of the Holly Farms Transportation Division, along with the other facts in the case and the labor policies governing this area of the law, which the Board and the Fourth Circuit found warranted the application of successorship principles to Tyson.

C. The Decisions of the NLRB and the Fourth Circuit on This Issue Are Correct.

Whether a title was ascribed to Tyson (either as successor, joint or single employer or whatever), the critical determination was that Tyson had an obligation to bargain with the union representing the driver/yardmen employees. This determination by the Fourth Circuit is completely in concert with the decisions of this Court and the other circuits.

The Petitioners argue that where there is a stock transfer, successorship principles can never be applied. While it argues that this principle has been recognized by other circuit courts (and the Fourth Circuit in EPE), that claim is simply wrong. None of those courts have held that a company which purchases the stock of another can not be obligated to honor the legal relations established between that other employer and a union. When all the facts are considered and the legal policies which control are brought

into play, a company which has purchased the stock of another may have an obligation to bargain with the union that represents employees of that other corporation. This principle is found not only in the cases cited by the Petitioners, but also in a number of other decisions. Thus in NLRB v. Edjo, Inc., 631 F.2d 604 (9th Cir. 1980), enforcing 238 NLRB No. 207 (1978), Costa Trucking had a collective bargaining agreement with a union. The stock in Costa Trucking was purchased by Edjo, Inc. Costa Trucking continued to exist and was not merged into Edjo. The Board and the Ninth Circuit agreed that Edjo was a "successor" employer with a duty to bargain with the union before making unilateral changes in working conditions.

Similarly, in NLRB v. Winco Petroleum, 668 F.2d 973 (8th Cir. 1982), the Board and the Eighth Circuit found that a purchasing company was a "successor" corporation even though its purchase was made through a stock transfer. In that case, Cooper Oil bought all of the stock of Winco

and operated the business in the same way with the same employees and the same equipment at the same location from the date of the sale on March 6, 1979 until Winco was merged into Cooper Oil on April 2, 1979. Both the Board and the Eighth Circuit held that Cooper Oil became a successor on the date of sale.

Thus the Petitioners are incorrect when they claim that a "successorship" analysis is not appropriate in this case simply because there was a transfer of the stock in Holly Farms to Tyson. Both the Board and the Fourth Circuit took that factor into consideration but also looked at the other factors and how those factors affected the employees in the driver/yardmen unit. The Fourth Circuit properly found that the application of successorship principles was appropriate under all of those facts and in light of the labor policies governing these decisions. Because that decision is in accord with this Court's pronouncements in this area, this case does not present a case which is appropriate for this Court's

review.

II. THE NLRB AND THE FOURTH CIRCUIT PROPERLY REQUIRED THE PETITIONERS TO BARGAIN OVER THE EFFECTS OF THEIR DECISION TO TRANSFER THE DRIVERS TO TYSON FOODS.

The Petitioners seek to limit the effects about which they are required to bargain following their determination to transfer the drivers to Tyson Foods. While Petitioners admit they must bargain over effects, they claim that the "effects" over which they must bargain are limited and few. The Petitioners' argument is directly contrary to this Court's pronouncements and the decisions of the other circuit courts of appeals.

The Fourth Circuit required that the Petitioners negotiate about any "effects" which are "not the inevitable consequence of the underlying management decision." (A-33-34) This is the same standard used by the Ninth Circuit in NLRB v. Litton Fin. Printing Division, 893 F.2d 1128

(9th Cir. 1990), rev'd in part on other grounds, 501 U.S. 190 (1991). The decision of both the Fourth and Ninth Circuits is based directly on this Court's prior decisions and fully comports with those decisions.

Petitioners point to no conflict between the circuits, and while they claim the Fourth Circuit decision is inconsistent with this Court's opinion in First National Maintenance Corp. v. NLRB, 452 U.S. 666 (1981), they point to no specific language within that decision which requires a test different from that used by the Fourth Circuit here. Moreover, Petitioners do not propose any rule or standard to replace the one used by the Fourth and Ninth Circuits. This is not surprising given that it would be impossible to fashion such a rule which would remain faithful to this Court's opinion in First National Maintenance while achieving the limited result Petitioners desire.

The standard followed by the Fourth and Ninth Circuits arises out of and is consistent with this Court's

opinion in First National Maintenance and presents a rational and workable standard to use in determining the "effects" which are the subject of bargaining.

This case therefore does not present an appropriate vehicle to address a question which is not in conflict between the circuits and which complies with this Court's earlier directives.

Finally, Intervenors believe that Petitioners were obligated to bargain over the original decision to transfer the Holly Farms drivers to Tyson Foods (the "integration decision") based upon this Court's decision in First National Maintenance, supra. If that is correct, then Petitioners cannot limit the bargaining to the "effects," but must bargain over all possible issues. This is a further reason why Petitioners' argument must fail and why the Petition should therefore be denied.

III. REINSTATEMENT WITH BACK PAY WAS THE PROPER REMEDY FOR EMPLOYEES DISCHARGED IN VIOLATION OF THE NATIONAL LABOR RELATIONS ACT.

The NLRB found that in transferring the drivers from Holly Farms to Tyson, the Petitioners had unlawfully discharged some 47 employees and ordered Petitioners to reinstate those drivers with back pay. (A-178-179) Though the Petitioners do not now contest the finding that these employees were unlawfully discharged, they ask this Court to grant certiorari in order to determine if the Board could grant such a remedy. On that issue there is no doubt but that the Board has that authority, and the Petition should therefore be denied.

Congress has given the Board the exclusive power to grant remedial relief. NLRB v. Food Store Employees Local 347, 417 U.S. 1, 8 (1974). If the Board determines that an unfair labor practice has occurred, § 10(c) of the Act, 29 U.S.C. § 160(c), requires the Board, among other

things, "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of [the Act]." Therefore, the Board's remedy will not be sustained only if it is in excess of the Board's authority. Virginia Elec. & P. Co. v. NLRB, 319 U.S. 533, 540 (1943). Here, the Board's remedy was specifically that granted to it by Congress — reinstatement with back pay. Petitioners cite no circuit court decision holding otherwise, and the Fourth Circuit felt the issue was so settled, it did not even mention it in the decision. Thus this issue is not one which requires this Court's attention, and the Petition should be denied.

IV. THE NLRB PROPERLY EXERCISED ITS EXPERTISE IN DETERMINING THAT LIVE-HAUL DRIVERS, FORKLIFT DRIVERS AND CHICKEN CATCHERS ARE NOT AGRICULTURAL EMPLOYEES.

A. The Fourth Circuit Correctly Deferred to the NLRB's Decision on This Issue.

The Petitioners seek to avoid bargaining with Local 391 concerning the "live-haul" unit by claiming that among those employees are agricultural workers.[2] The NLRB found that under the facts in this case the employees in question were not agricultural workers. This decision was consistent with its rulings in other cases raising this issue.

It is the NLRB's special duty to apply the Act's exemption for agricultural laborers "to varying fact patterns." Bayside Enterprises, Inc. v. NLRB, 429 U.S. 298, 304 (1977). In performing that duty, the NLRB must construe the provisions of the Act liberally in favor of the workers for whose protection those laws were designed and "narrowly construe" any exemption from the terms of those laws. Wirtz v. Ti Ti Peat Humus Company, Inc., 373 F.2d

[2]The Petitioners do not now contest that they committed numerous unfair labor practices in this unit or that a bargaining order is appropriate under these circumstances. Instead, they attempt to avoid the effect of these rulings by claiming that the unit is inappropriate because it contains agricultural employees.

209, 212 (4th Cir.) cert. denied, 389 U.S. 834 (1967). The Board's construction of the agricultural laborer exemption is entitled to deference on review because it presents a question that is "particularly unsuitable" for a reviewing court. NLRB v. Cal-Main Farms, Inc., 998 F.2d 1336, 1339 (5th Cir. 1993). Accord, Bayside Enterprises, 429 U.S. at 304 n. 14. The Fourth Circuit gave proper deference to the NLRB's decision, which it found was consistent with those the Board had made in similar cases. (A-49) Thus this case is not one that needs further appellate review.

B. There Is No Conflict Between the Circuits On This Issue.

The Fourth Circuit also recognized that the other federal appellate decisions which were squarely on point had found that employees engaged in the type of tasks involved in this case were not agricultural laborers. (A-50-51) NLRB v. Hudson Farms, Inc., 681 F.2d 1105, 1106 (8th Cir. 1982) cert. denied, 459 U.S. 1069 (1982); Valmac Industries

v. NLRB, 599 F.2d 246, 247, 249 (8th Cir. 1979). While the Fourth Circuit refused to follow the decision in Coleman v. Sanderson Farms, Inc., 629 F.2d 1077 (5th Cir. 1980) — the case relied upon by the Petitioners to claim a split in the circuits[3] — it did so because of a fundamental difference in the cases. As the Fifth Circuit itself recognized in Coleman, that case arose under the FLSA and not the NLRA. Accordingly, it had not been subject to overview by the NLRB and was not subject to the policy of judicial deference to NLRB determinations. The Fourth Circuit found this fact crucial when it determined that Coleman was not binding because it "fails to give proper weight to the judgment of the

[3]The Petitioners also cite NLRB v. Victor Ryekebosch, Inc., 471 F.2d 20 (9th Cir. 1972) as a conflicting decision. However, that case was cited by this Court in Bayside as a case in conflict with the circuit court opinion in Bayside. 429 U.S. at 299 n. 4. Thus by affirming the Board's decision in Bayside, this Court found that the Ninth Circuit's decision in Ryekebosch was wrong. That decision thus cannot be considered as a viable conflict with the Fourth Circuit decision in this case.

Board," citing this Court's opinion in Bayside Enterprises, 429 U.S. at 304. (A-52) Therefore, the Petitioners are incorrect when they claim that the Fourth Circuit's decision in this case conflicts with the decision in Coleman.

As there is no real conflict between the circuits, as the Board's decisions in this area are completely consistent, and as the Board's determinations are entitled to great deference from reviewing courts, this issue has been properly determined by the Fourth Circuit and does not require review by this Court.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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